IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR No. 4253 of 1997
Date of Decision: 21.2.2007

M/s Om Metals & Minerals (P) Ltd. ...Petitioner

Versus

The Haryana State Minor Irrigation & Tubewell Corporation Ltd. and others

....Respondents

Coram: Hon'ble Mr. Justice Hemant Gupta.

Present: Shri A.D. De. Advocate, for the petitioner.

None for the respondents.

HEMANT GUPTA, J.

Challenge in the present revision petition is to the order passed by the learned first Appellate Court on 10.5.1997, whereby an application filed by the petitioner for filing of the arbitration agreement and referring the dispute to the Arbitrator in terms of the agreement was declined.

M/s Haryana State Minor Irrigation and Tubewells Corporation Ltd. (hereinafter referred to as `the Corporation') invited tenders for the work and of design, fabrication, supply, erection, testing and commissioning of hoists and gantry crane for Massani Barrage Project .

The tender submitted by the petitioner being lowest was accepted and a purchase order dated 7.1.1988 was issued. In terms of the purchase order, the petitioner was to submit designs/drawings for approval in respect of hoists including lifting arrangement by April, 1988 and in respect of gantry crane including lifting arrangement and rails by June, 1988. The contract was to be completed by July, 1989. Subsequently, an agreement was executed on 14.3.1988 having conveyed the acceptance of such purchase order. It is admitted that such an agreement contains Clause 36 pertaining to reference of disputes to the sole arbitration of the person appointed by the Corporation. The said clause reads as under:-

> "36. ARBITRATION
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> Except where otherwise provided for in the contract, all questions, disputes or differences, whatsoever, arising between the Contractor and the Corporation upon or in relation to or in connection with this contract, either of the parties may give to the other notice in writing of the existence of such a question, dispute or difference and the same shall be referred to the Sole Arbitration of the person appointed by the Corporation at the time of dispute. There will be no objection in such appointment, if the Arbitrator or so appointed is a Corporation employee and in the course of his duty as Corporation employee, has expressed view on all or any of the matter in dispute or difference. The Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act

for any reason, then the Corporation shall appoint another person to act as Arbitrator, in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

Subject to aforesaid, the provisions of Arbitration Act, 1940 or any statutory modification or re-enactment thereof, and the rules made thereunder and for the time being in force shall apply to the Arbitration proceedings under this Clause.

The Arbitrator shall decide in what proportion the Arbitrator's fees, as well as the cost of Arbitrator proceedings shall be borne.

The Arbitrator with the consent of the parties may enlarge the time, from time to time, to make and publish his award.

A notice of the existence of any question, dispute or difference in connection with this contract, shall be served by either party within 180 days of the issue of taking over certificate by the Engineer-in-Charge, failing which all rights and claims under this Contract shall be deemed to have been forfeited and absolutely barred. Where the amount of claims in dispute is Rs.50,000/- (Rupees Fifty Thousand Only) and above, the Arbitrator shall give reason for the award. The work under this contract shall continue during Arbitrator proceedings and no payment due from or payment by the Corporation shall be withheld on account of such proceedings except to the extent which may be in dispute."

As per the petitioner, designs of hoists, gantry were submitted. The Executive Engineer of the Corporation informed the petitioner vide letter dated 4.11.1988 that the drawings for hoists, submitted by the petitioner were found to be generally in order. The approval would be communicated in due course of time. In respect of designs and drawings for the gantry crane, it was mentioned that the Corporation has asked some clarifications vide letter dated 16.12.1988. Such clarifications were submitted by the petitioner on 3.1.1989 but the petitioner has not received any approval of the drawings for gantry crane. It was, thus, claimed that the petitioner has invested huge amount of money on preparation of designs and drawings and on fabrication of various equipment and thus, a sum of Rs.95 lacs have become due towards the petitioner against the Corporation. This is the stand of the petitioner in communication dated 2.2.1993 appended as document No. 3 with the petition. It may be noticed that vide communication dated 12.7.1993, it was conveyed by the Corporation that the Corporation has neither conveyed the approval of drawings nor issued any go-ahead instructions at any stage. Therefore, any manufacturing or other work performed or expenditure incurred is at risk and responsibility of the petitioner.

The learned trial Court allowed the application filed by the petitioner and directed the parties to submit three names each for appointment of an Arbitrator. Such application under Section 20 of the Arbitration Act, 1940 was filed on 9.11.1994. However, the learned first Appellate Court has accepted the appeal filed by the Corporation and returned a finding that the petitioner could manufacture/fabricate the material after the approval had been accorded by the officials of the

Corporation and, therefore, cause of action, if any, arose on the execution of the agreement and in any case the starting of limitation cannot be extended beyond July, 1989 i.e. the period fixed for the performance of the contract. Consequently, the appeal was accepted and the application under Section 20 of the Act, was dismissed, being barred by limitation.

Learned counsel for the petitioner has vehemently argued that the cause of action for the purposes of filing of the suit, had the matter been taken to the Civil Court, would not be applicable in respect of moving an application under Section 20 of the Act. Reference has been made to the judgment of the Hon'ble Supreme Court in **Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority, AIR 1988 Supreme Court 1007** and **Union of India and another v. M/s L.K.Ahuja and Co., AIR 1988 Supreme Court-1172.** It has further been argued that in any case the cause of action has arisen to the petitioner when it was communicated by the respondents in July, 1993 that the designs/drawings have not been approved.

Present is a case where in pursuance of the contract having been entered upon, the work was not executed. In terms of the contract, the petitioner was required to submit drawings or designs by April, 1988 and the work was to be completed by July, 1989. Therefore, it is required to be examined whether the communication addressed by the Corporation in July, 1993 shall commence the period of limitation.

As mentioned above, the agreement provides for a time schedule for furnishing of designs/drawings and of completion of project. The said time schedule was not adhered to. Without going into the question whether it was default on the part of the petitioner or of the

Corporation, the fact remains that the execution of the contract was not completed by July, 1989 nor there was any extension of time granted by the Corporation for execution of the contract. Therefore, in my opinion, the cause of action to claim damages on account of non-fulfillment of contractual obligations would arise when the contract was required to be completed. Since the contract was to be completed by July, 1989, the claim for liquidated damages raised by the petitioner was required to be made within three years of such period.

In **L.K. Ahuja's case (supra),** no claim certificate was given by the Contractor in June, 1972. The claim was raised by the Contractor for referring the dispute to an Arbitrator on 4.6.1976. The said request was replied on 4.6.1976. It was also held that there are two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act and secondly, whether the claim to be adjudicated by the Arbitrator was barred by lapse of time. It was held that second is the matter which the Arbitrator would decide, but for the purpose of determining that an application under Section 20 of the Act is within limitation, there must be entitlement to money and differences or dispute in respect of the same.

In **Major (Retd.) Inder Singh Rekhi's case (supra),** it was held that a party cannot postpone the accrual of cause of action by writing or sending reminders, but where the final bill had not been finally prepared, the non payment to the claimant is the accrual of the cause of action. A dispute arises where there is claim and a repudiation by the opposite party.

In case **State of Orissa and another v. Damodar Dass, 1996(2) SCC 216**, it has been held that the limitation for an

application under Section 20 of the Act commences from the date on which cause of arbitration accrued. It was held to the following effect:-

> "5. *Russell on Arbitration* by Anthony Walton (19th Edn.) at PP-4-5 states that the period of limitation for commencing an arbitration runs from the date on which the cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued:
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> > "Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued."
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> Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.
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> 6. In *Law of Arbitration by* Justice Bachawat at P-549, commenting on Sectin 37, it is stated that subject to the Limitation Act, 1963, every arbitration must be commenced within the prescribed period. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the cause of

> action accrues, so in the case of arbitration the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37 (1) `action' and `cause of arbitration' should be construed as arbitration and cause of arbitration. The cause of arbitration arises when the claimant becomes entitled to raise the question i.e. when the claimant acquires the right to require arbitration. An application under Section 20 is governed by Article 137 of the schedule to the Limitation Act, 1963 and must be made within 3 years from the date when the right to apply first accrues. There is no right to apply until there is a clear and unequivocal denial of that right by the respondent. It must, therefore, be clear that the claim for arbitration must be raised as soon as the cause for arbitration arises as in the case of cause of action arisen in a civil action".

In the present case, the question is whether there was any valid claim for reference made under Section 20 of the Act. The first reference for the appointment of an Arbitrator was made by the petitioner on 2.2.1993 i.e. beyond the period of three years fixed for completion of the project. The petitioner became entitled to the damages when the drainage/designs were not approved. The dispute arose when no work was assigned even though the contract was executed and designs as per the petitioner were submitted. Therefore, the cause of action would arise to the petitioner at an earlier point of time, but not later than the stipulated period fixed for the performance of the agreement. In view of the principles laid down in the aforesaid judgments itself, the application under Section 20 of the Act, cannot be said to be within the period of limitation.

Consequently, I do not find any patent illegality or irregularity in the order passed by the learned first Appellate Court, which

may warrant interference by this Court in exercise of its revisional jurisdiction.

Hence, the present petition is dismissed.

February 21, 2007 (HEMANT GUPTA)
ds JUDGE